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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

HUDSPETH COUNTY CONSERVATION & RECLAMATION DISTRICT No. 1, ET AL., *Petitioners*

v.

HOWARD E. ROBBINS, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May It Please the Court:

Petitioners, Hudspeth County Conservation & Reclamation District No. 1 and others, would respectfully show the Court the following:

A. OPINION BELOW

The opinion of the Court of Appeals (R. 649) is reported in — F. 2d —, at R. 649 of the printed record, and in the Appendix to this Petition beginning at page A22 hereof.

B. STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered May 27, 1954. No rehearing has been sought. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

C. QUESTIONS PRESENTED

1. In the case of *Ickes* v. *Fox*, 300 U. S. 82 (1937), this Court held that a farmer who makes beneficial use of water under a Federal Reclamation project thereby acquires a vested appropriative property right to the continued use of such waters, which water right cannot be limited by a contract between himself and the Government. In this case, the court below held that the rule of *Ickes* v. *Fox* does not apply to protect a farmer who has beneficially used water which Federal Reclamation officials have delivered to him under authority of the Warren Act. The first question presented is this:

Are water rights of Warren Act farmers of inferior character and dignity to those of Reclamation "Project" farmers in that the former may be limited or destroyed by a Government contract?

2. In 1906 and 1908 the Reclamation officials, under state authority, filed Notices of Intent to Appropriate the waters of the Rio Grande for use in an area embracing all the land in the Hudspeth District. The Court of Appeals holds that by beneficial use of water within the terms of such Notices the Hudspeth farmers *cannot* acquire appropriative water rights, because at a later date the Hudspeth lands had been excluded from the "Project" and treated as Warren Act lands. Thus this second question is presented:

Is a farmer, solely because his farm lies within a Warren Act District, barred from acquiring a vested appropriative water right by beneficial use of water within the terms of a prior Notice of Intent to Appropriate which includes his land?

3. In *Ickes* v. *Fox* this Court held that the farmers might protect their water rights by suit to enjoin a Federal official from interfering with those rights. The court below held, however, that, even assuming these Plaintiffs have vested property rights in the use of water, they cannot sustain a similar suit for injunctive relief because the Defendant Reclamation officials have general statutory authority to operate the government-owned irrigation dams and canals. For this holding the court relies on the case of *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949).[1]

The third question presented is:

Does the *Larson* case go so far as to hold that Government officials with general statutory authority to operate Government property can claim sovereign immunity for acts of operation which deprive individual citizens of their vested property rights?

D. STATUTES INVOLVED

The statutes involved are Section 8 of the Reclamation Act (Act of June 17th, 1902, c. 1093, § 8, 32 Stat. 390; 43 U.S.C. §§ 383, 372); and Section 1 of the Warren Act (Act of February 21st, 1911, c. 141, § 1, 36 Stat. 925; 43 U.S.C., § 523). These statutes are set forth in the Appendix to this Petition at page A21.

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[1] In applying the test of the *Larson* case the court below said (*infra*, p. A33):

> "Applying that test, it seems clear to us that if the dams, reservoirs and irrigation facilities had been owned by a private corporation whose managers and agents had violated the rights of the plaintiffs in the manner contended in this suit, the private corporation could not escape liability for damages on the ground that its employees were acting outside the scope of their authority."

The court then held that the Government officers had authority to operate the works and since a private employer would have been liable for their trespasses, such trespasses could not be enjoined.

E. STATEMENT OF THE CASE

For purposes of convenience we will refer to Petitioners as Plaintiffs and to Respondents as Defendants.

In 1906 and 1908, in conformity with state procedure, Federal Reclamation officials filed Notices of Intent to Appropriate all the then unappropriated waters of the Rio Grande by diversion through contemplated irrigation works of the proposed Rio Grande Project. By the express terms of such Notices, the area in which waters so diverted was to be used includes all the lands within the Hudspeth District.

For twenty-six years prior to 1951, pursuant to such Notices, irrigation water was diverted from the stream and delivered to the Hudspeth farmers through the irrigation works of the Rio Grande Project. The water was applied to beneficial use on the Hudspeth farms, and a prosperous local community was built up.

The water was delivered to the Plaintiff farmers under the authority of the Warren Act. A Warren Act contract was signed by the Government and the Hudspeth District, a municipal corporation. The contract was not signed by any individual farmer. This Warren Act contract purported to authorize the Reclamation officials in their uncontrolled discretion to divert the water beneficially used by the Hudspeth farmers to so-called "Project" farmers whose beneficial use was subsequent to the Plaintiffs. This diversion is contrary to the ruling in *Ickes* v. *Fox* that beneficial use is the measure of a water right acquired under the reclamation laws and that a right so acquired can not be limited by contract.

Purporting to act under this contract and beginning in 1951, the Defendant Reclamation officials have cut off deliveries of water to Hudspeth District and diverted it to farmers in upstream "Project" Districts, whose beneficial use of water is subsequent in time to that of Plaintiff Hudspeth farmers. Today the entire water supply of Hudspeth District is shut off and its farmers face utter ruin.

Plaintiffs below brought suit for a judgment declaring that their beneficial use of the water under the above described Notice gives them a vested property right and enjoining the Reclamation officials from diverting the water plaintiffs beneficially used to subsequent appropriators. The procedural details are set out in the footnote below.[2]

The Court of Appeals held that the plaintiff farmers have no vested property rights and, further, are barred from relief by the doctrine of sovereign immunity. The court gave the following reasons which somewhat overlap in the opinion:

1. Because plaintiffs' farms are within a Warren Act irrigation district instead of a Reclamation "Project" district, the rule of *Ickes* v. *Fox*, that beneficial use is the measure of their water rights, does not apply in this case.

2. The Notice of Intent to Appropriate, under which the defendants originally diverted the water from the Rio Grande and carried it to the Hudspeth District, is ineffective to initiate water rights for plaintiffs' lands because their lands are located in a Warren Act district, rather than a "Project" District.

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[2] This suit was brought by the Hudspeth County Conservation and Reclamation District No. 1 (a Texas municipal corporation, herein called "Hudspeth District") and five individual landowners as representatives of all the landowners of the Hudspeth District. In addition to officials of the Bureau of Reclamation, El Paso County Water Improvement District No. 1 (also a Texas municipal corporation, herein called "El Paso District"), its manager, and thirteen individual landowners as representatives of parties whose claims to the water are adverse to the Hudspeth landowners, are also named as defendants.

Both plaintiffs and defendants moved for summary judgment in the District Court. That Court gave summary judgment to defendants and denied plaintiffs' motion. The Court of Appeals reversed the judgment on the merits, but remanded the cause with directions to dismiss the complaint for want of jurisdiction, the Court of Appeals concluding that the action, in substance, is a suit against the United States which is barred by the immunity of the sovereign.

The plaintiffs, who were appellants in the Court of Appeals, here petition for certiorari.

3. Even if plaintiffs did have vested rights, they could not enforce them. The fact that the Government owns and its agents operate the irrigation dams and canals gives the Government agents sovereign immunity against a claim of an individual land owner whose water right is impaired or destroyed by unlawful acts of operation.

Plaintiffs claim that each of these rulings is error.

They assert that all rights to the use of the waters of the upper Rio Grande are based upon prior beneficial use of such waters and that priority of beneficial use must control distribution of water by the reclamation officers. The distinction which the court makes in first and second grounds of its decision, between water rights appurtenant to lands located in a Warren Act irrigation district and those located in a "Project" district, has no basis in law.

No geographic limits to the area to be irrigated by water diverted through the Project works were ever defined by any order of the Government. The only distinction which can be made between "Project" lands and Hudspeth lands are as follows: The ditches and canals in the "Project" Districts are owned and operated by the United States. The ditches and canals in the Hudspeth District are financed, owned and operated by that municipal corporation. The Reclamation Bureau does not deliver water directly to the landowners in the Hudspeth District, but rather to the irrigation works owned by the District. For this reason, contracts of the "Project" Districts with the Government necessarily differ from those of the Hudspeth District and are authorized by different provisions of the Reclamation laws. There are differences in method of payment for carriage of water. And, finally, the Hudspeth District contract contains provisions which, defendants claim, give the defendant Reclamation officials uncontrolled authority to shut off water from Hudspeth farmers when farmers in the "Project" Districts with subsequent rights are short.

Our position is that the differences between a "Project" District and Warren Act Districts with respect to ownership of irrigation works or otherwise do not authorize the Secretary to limit by contract the water rights appurtenant to lands in Warren Act Districts acquired by beneficial use. This is because the Reclamation laws and the decisions which interpret them adopt the doctrine of prior appropriation and make beneficial use the sole basis, the measure and the limit of a landowner's right to use water diverted from a running stream through the Reclamation works. The Government (acting through its Reclamation Bureau) is only a carrier of water. It has rights to reimbursement of carrying costs. But it possesses no beneficial or proprietary rights to use of water. Under the Reclamation Act and the Warren Act, the Reclamation Bureau can neither create, nor change by contract, the water rights acquired by operation of law from beneficial use.

The third reason which the court below gives for its ruling extends the doctrine of sovereign immunity so as to permit the officials charged with operating government works to trespass on private property. This is clearly error.

G. JURISDICTION OF UNITED STATES DISTRICT COURT

This action was commenced in the State Court and removed by the defendants to the United States District Court for the Western District of Texas. The grounds for removal were (1) that this is a case arising under the laws of the United States, namely, the Reclamation Act and the Warren Act as to which the District Court had jurisdiction under 28 U.S.C., §§ 1331, 1441; and (2) this is an action against an officer of the United States for an act under color of his office, removal of which action is authorized by 28 U.S.C., § 1442(a)(2).

H. REASONS FOR ALLOWANCE OF THE WRIT

Briefly stated, the reasons why we believe certiorari should be granted are as follows:

1. There is a clear conflict between the ruling of the court below and the opinion of this Court in *Ickes* v. *Fox,* in that the court below did not take the test of beneficial use as the basis, measure and limit of the water right acquired under a reclamation project. It is true that the court below attempted to escape from *Ickes* v. *Fox* by holding that a different principle applies to lands lying within a Warren Act irrigation district. This distinction we believe to be without validity and indeed contradictory of the provision of the Warren Act itself, which reads as follows:

> "*Provided, however,* That water so impounded, stored, or carried *shall not be used otherwise* than as prescribed by law as to lands held in private ownership within Government reclamation projects." (Emphasis supplied)

The question is of the utmost public importance because the precedent of the opinion below will injuriously affect thousands of water users under every reclamation project in the United States.

2. The conclusion of the Court of Appeals that water rights appurtenant to lands in Warren Act districts cannot be initiated by a permit or notice of intent filed "in connection with a reclamation project" is in conflict with *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945), and with *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80 (8th Cir. 1920). The decision, therefore, throws a cloud on the title to all other Warren Act water rights acquired under similar notices and permits.

3. The questions presented by this case are becoming of increasing importance because of the dry cycle which is injuring farmers in practically all irrigation areas. Added

to this climatic change is the fact that a large number of new lands have been irrigated whose priority in time is subsequent to Warren Act water users. The addition of these new lands has become increasingly feasible through the development of electric pumps which permit the addition of new lands which could not formerly be served by gravity flow.[3]

This presents the following question of paramount interest in our irrigation laws: Does the Secretary of the Interior have the power ad infinitum to add new lands to a Reclamation project at the cost of the complete destruction of the Warren Act farmers who have built up the value of their property over a long period of years when water was delivered to them freely?

If this power exists, the discretion of the Secretary in enlarging the project at the expense of prior Warren Act users is completely uncontrolled. A decision in the Reclamation Bureau of this character can spell instant ruin to hundreds of people who will have no legal redress. We do not think that the Warren Act contemplated the granting of such an arbitrary power. We think that it cannot be usurped by inducing irrigation districts who are municipal corporations to barter away by contract the rights that individual farmers obtain by beneficial use. In any event, we assert that the question raises an issue of tremendous importance throughout our reclamation system and it should, therefore, be settled by this Court.

4. The decision below puts a construction on the opinion of four judges in the *Larson* case which in effect overrules the case of *Land* v. *Dollar*, 330 U. S. 731 (1947). It extends the doctrine of sovereign immunity so far as to make the authority to manage government property include the power to take private property without judicial

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[3] Electric pumps are now used on the Rio Grande Project to further impair the use of seepage water formerly used by the Hudspeth farmers. (R. 140-141, 144, 158, 166-168.)

process. We do not think that the *Larson* case should be construed as the court below construes it. But in any event the decision throws a cloud on the extent of sovereign immunity which may cause endless confusion if the question is not resolved by this Court.

ARGUMENT

As the basis and character of rights to use irrigation water on "Project" lands (which it distinguished from Warren Act lands) the Court of Appeals expressly recognized the controlling authority of *Ickes* v. *Fox* and *Nebraska* v. *Wyoming*. The basis and character of such rights, as laid down in these cases and in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142 (1935) (which case is discussed in *Ickes* v. *Fox*), may be summarized as follows:

The proviso to Section 8 of the Reclamation Act (quoted below[4]) incorporates into the Reclamation laws the arid region doctrine of prior appropriation. This doctrine, which is peculiar to the States in the western half of this country, has its origins in the California gold fields during the turbulent period of the gold rush. Impelled by the stern realities of pioneer life in the arid region, the miner's custom of prior appropriation was formalized by statute, was enforced by the courts and spread rapidly throughout the Western half of the Union. By the turn of the century, virtually all the states and territories to which the Reclamation Act now applies had formally adopted the doctrine of prior appropriation, either alone or in conjunction with the common law riparian doctrine.

The conventional language in the arid region to express the doctrine of prior appropriation of water is that set

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[4] "Provided, That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

forth (almost verbatim with the proviso to Section 8 of the Reclamation Act) in the Texas statute:

> "Such [beneficial] use shall be the basis, the measure and the limit to the right to use water . . ." (Art. 7542, Tex. R.C.S.)

This means: That an appropriative right to use water can be perfected as a vested property right only by actually using water for irrigation or another beneficial purpose; the owner of an appropriative water right may take and use as much water as is necessary for his beneficial purpose; but no more.

A fundamental and necessary incident to the doctrine of prior appropriation (whereunder the right is *measured* by beneficial use) is the principle of priority, which is expressed in the Texas statute thus:

> "As between appropriators, the first in time is the first in right . . ." (Art. 7472, Tex. R.C.S.)

Thus, the senior appropriator may use as much water as he needs for his beneficial purpose, but no more. If more water is available, the second most senior may use what he needs, but no more. If still more water is available, the third most senior may take, and so on. In times of shortage, the most junior appropriators are cut off.

With respect to rights to use water delivered through Government Reclamation facilities, Section 8 of the Reclamation Act (quoted p. A21) provides that such rights must be initiated and perfected in accordance with the State or Territorial procedure; that when perfected (by application of water to actual beneficial use) the perfected water right vests as an appurtenance to the land irrigated as the real property of the landowner; that such water rights are appropriative in character (that is, based, measured and limited by beneficial use); that the Government is solely a carrier of water, its property right in the canals, dams and reservoirs being wholly distinct and apart from

the property rights of the landowners in the perfected rights to use waters carried through those facilities.

In *Ickes* v. *Fox* this Court considered the power of the Secretary to limit by contract the appropriative water rights so conferred by Section 8 of the Reclamation Act and the jurisdiction of the Federal Courts to enforce such appropriative rights by injunction directed to the Federal officer. In conformity with the applicable state statute, the Secretary of the Interior had filed notices of intent to appropriate the unappropriated waters of the Yakima River, which the landowners later perfected as appropriative water rights by applying such waters to beneficial use on lands under the Yakima Reclamation Project. Thereupon the landowners executed contracts with the United States in the form of water applications on "officially approved forms", which contracts purported to give a Reclamation officer, in his administrative discretion, authority to limit the water rights of the landowners to less water than could be beneficially used on their farms. The Supreme Court held that the rights to use the water belonged to the landowners rather than to the Government, that administrative officials could not limit such rights by contract, and that the United States was not an indispensable party to an action to enjoin the administrative officials from interfering with such private property rights.

The Solicitor General, the Honorable Stanley F. Reed, stated the Government's interpretation of *Ickes* v. *Fox* in petitioning for rehearing on the ground that the opinion would lead to serious consequences in the administration of the Reclamation laws because it gave the farmers *prescriptive rights* based on *permissive use* of water. Referring to the case of the plaintiff Ottmuller, the Solicitor General correctly concluded (Petition for Rehearing filed in *Ickes* v. *Fox, supra*):

> "Ottmuller's contract was for three acre-feet per annum per acre, or so much thereof as shall constitute the proportionate share per acre from the water sup-

> ply actually available for the lands under the project * * *. The Court holds that Ottmuller, who alleged no source of his water right save under contract and delivery by the Secretary has a vested right through user for 5.56 acre-feet of water per annum because the Secretary in fact delivered the larger amount."

But the Court then fully affirmed its prior opinion by denying the petition for rehearing.

The 1924 contract in this case pursuant to which the defendant Reclamation officials and their predecessors for 26 years diverted and carried through Project works to Hudspeth District the waters of the Rio Grande, was authorized by Section 1 of the Warren Act, which provides in substance as follows:

> "Whenever * * * storage or carrying capacity * * * may be provided in excess of the requirements of [Project lands] * * *, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized * * * to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with * * * irrigation districts * * *."
>
> "*Provided, however,* That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects."

The holding of the Court of Appeals that Warren Act landowners have inferior water rights (or no water rights at all) is grounded on two erroneous conclusions: (1) that rights to use water on Warren Act lands cannot be initiated by a Notice of Intent to Appropriate (or the equivalent) filed "in connection with" a Federal Reclamation Project; and (2) that the statute authorizes the Secretary by contract to "preserve a first right" to the *use* of water on any "Project" lands which might at any time subsequently be irrigated.

1. That Ickes v. Fox cannot be distinguished on the latter ground is shown conclusively by the text and the legislative history of the Warren Act.

From the above quoted text of the Act, it seems clear that Section 1 authorizes contracts only as to *storage* and *carriage* of water and does not authorize contracts as to *rights to use* water. If *carrying capacity* is limited, the Reclamation Bureau should, of course, "preserve a first right" in such *carrying capacity* to Project lands.

The provision was passed at a time when water was abundant and carrying capacity had not been developed. In 1911, the date of the Warren Act, vast quantities of water were not being used because there was no way of carrying it to the land. It was thought only fair that the landowners who paid for the storage and ditches should have the first right to utilize those facilities. Today, the situation is reversed. There is more than enough capacity in the Rio Grande Project. There is only a shortage of water.

It is further implicit in the scheme of the Reclamation laws that, in determining who shall acquire water rights, the Secretary should keep in mind the contemplated needs of the Reclamation Project. Presumably a Secretary of the Interior would not ordinarily carry water to Warren Act lands at such time or under such circumstances as to permit the Warren Act farmers to acquire water rights which might interfere with the orderly development of the Project. But the Secretary only has the power to determine to whom he will initially deliver water. He has no power *by contract* to change the vested character of a water right itself.

Contracts authorized by this Section cannot be used to transform a vested water right appurtenant to Warren Act lands into a mere tenancy at the will of the Secretary. Congress kept clearly in mind the principle that rights to use water were property rights which could not be limited by contracts. To make this abundantly clear, it enacted

the proviso at the end of the Section that rights to the *use* of water (as opposed to *carriage* of water) should be governed by the same principle of beneficial use, whether within or without the Project.

As it originally passed the Senate the Warren Bill provided that, if he should find that a part of the water supply of a reclamation project might "be disposed of" to the advantage of the Project, the Secretary might contract for the delivery of it. The House of Representatives, however, made significant changes in the Bill as indicated by the committee report presented by Congressman Reeder, who managed the Bill in the House:

> "* * * our changes have been made largely, if not entirely, with the idea of *not* establishing a system of selling water, but simply of permitting the impounding and carrying of the water which is appurtenant to their lands. [i.e. the lands under the Warren Act Contract]" (46 Cong. Rec. 2109 [1911]).

The Bill then went to Conference, and the Senate joined in the changes proposed by the House. As explained by Congressman Reeder, who managed the Conference Report in the House:

> "It [the bill] is to authorize contracts with outside parties either private persons or corporations, so that they, by paying their proportionate percent of the money required for building reservoirs and ditches, can carry the water *that belongs to their land* through those ditches.
>
> "* * * As it passed the Senate this bill provided for the disposition of water. *The House committee held that Congress does not have the right to provide for the disposition of water; that water is appurtenant to the land,* and that whoever by a proper course secures the water for his land makes the water appurtenant to that land. Therefore, we changed the bill so as to provide for *impounding* and *carrying* the water, rather than for *disposing* of it. The Senate conferees agreed with us on every proposition."[5]

[5] These debates are set forth at 46 Cong. Rec. 2780-83 (1911); all emphasis is supplied.

With respect to relative rights to the *use* of water carried under Warren Act contracts, Congressman Reeder explained:

> "* * * if * * * private individuals [i.e. landowners under a Warren Act contract] come in and establish a right to water and use it on their lands, and then another unit of the government project is taken up, *I am inclined to think that the next unit under the irrigation project would suffer the loss* because ownership of water is regulated by beneficial use * * *."

Later, in answer to repeated questions, the Congressman stated over and over again that the rights to use water to be carried under the proposed bill would be based upon and measured by beneficial use of the water, rather than by the contract with the Government. For example:

> "Mr. Mann. Does the gentleman mean to say if the Government makes a contract authorizing the use of water that the actual use of the water depends upon the time of making the contract?
>
> "Mr. Reeder. The ownership of the water depends upon *the time of commencing the use of it* and their continuance of beneficial use of the same.
>
> "Mr. Mann. That is clearly not the case.
>
> "Mr. Reeder. That clearly is the case.
>
> "Mr. Mann. Does the gentleman mean to say that if you make a contract with A to furnish him so much, and then with B to furnish him so much water, in case there is a shortage, the contract with B fails and A can get the water?
>
> "Mr. Reeder. Certainly.
>
> "Mr. Mann. That will depend upon the contract.
>
> "Mr. Reeder. *It does not depend upon the contract at all.*"

Finally, Mr. Reeder restated his earlier hypothetical case and gave the same answer—that if landowners under the Warren Act contract beneficially used the water first, they would have superior rights. He justified his answer thus:

> "Now, I answered my conscience in this matter in this way: that if all the water in the stream is used near its source to produce crops, the sooner this can be consummated the better, and each comer will likely get water *in the order of his putting it to beneficial use.* We cannot in any way increase the amount of water, and the well established principle in water ownership for irrigation of 'first come, first served' is probably best after all, *whoever gets left.*"

Whereupon, without change, the Conference Bill was enacted into law as the Warren Act.

2. The conclusion of the Court of Appeals that rights to use water on Warren Act lands cannot be initiated by a filing "in connection with" a Federal Reclamation Project squarely conflicts with an applicable decision of this Court and with the decision of another Court of Appeals on the same matter.

For the purpose of fixing relative priority dates of appropriators the various Western states have made it a statutory prerequisite to the perfection of a water right by beneficial use that "a notice of intent to appropriate" or "a permit to appropriate" should have been previously filed with some public officer. That prerequisite is supplied in this case by Notices of Intent to Appropriate all the then unappropriated waters of the Upper Rio Grande filed in 1906 and 1908 by Reclamation officials. These notices are set forth in full at R. 69, 71. The area designated by the Notices, while not specific, unquestionably includes plaintiffs' lands.

The court below reached the conclusion that these Notices did not cover plaintiffs' land, not by construing the language of the Notices, but by holding that no Notice "filed in connection with" a Reclamation project could possibly serve to initiate rights appurtenant to lands in a Warren Act District. (Note 6, p. A31.)

We have already argued that no valid distinction can be made between water rights on lands in Warren Act Districts and those in "Project" districts. We now point out

that, apart from that argument, the failure of the Court to give effect to these Notices with respect to plaintiffs' Warren Act lands is in direct conflict with the decision in *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945). The opinion in that case does not discuss the distinction drawn by the court below. However, in that case this Court did grant to Warren Act lands a priority (as to impounded waters) dating back to the original permit filed "in connection with" the North Platte Reclamation Project. In doing so it subordinated subsequently-acquired rights of lands under the Kendrick Reclamation Project.

The decision below is also in conflict with *Ramshorn Ditch Co.* v. *United States*, 269 Fed. 80 (8th Cir. 1920). There the Project permit was for lands in Nebraska on the North Platte River. The court expressly held that the Reclamation Project permit was sufficient to initiate rights to use water on the Warren Act lands, and enjoined a subsequent appropriator from intercepting the water.

This holding of the Court of Appeals is a cloud on the water right title of every farmer in the country irrigating his land with water delivered pursuant to a Warren Act contract. The number of water right titles which might be affected by this holding of the Court of Appeals is only vaguely indicated in the finding of this Court in *Nebraska* v. *Wyoming* (325 U. S. at 604, 605, n. 10) that, in one short reach of the North Platte River alone, more than 90,000 acres of lands in a number of irrigation districts are served pursuant to Warren Act Contracts.

3. The Supreme Court should review and reverse the holding of the Court of Appeals that vested real property rights may not be protected by injunction against unlawful seizure by a Federal official.

The Court of Appeals held that, regardless of the extent to which the defendant Reclamation officials unlawfully invaded the private property rights of the plaintiff Hudspeth farmers, plaintiffs' action for injunction against the

Federal officials would not lie. The court held that such a suit is against the United States and barred by the immunity of the sovereign, unless the actions of the Federal officials are so *ultra vires* of their authority that their employer (if a private corporation) would not be liable under the doctrine of *respondeat superior* for the trespass.

This holding of the Court of Appeals is clearly contrary to *Ickes* v. *Fox,* and to the entire long line of cases beginning in 1882 with *United States* v. *Lee,* 106 U. S. 196 (1882), and culminating in 1947 with *Land* v. *Dollar,* 330 U. S. 731 (1947). The rule in *Land* v. *Dollar* limited the doctrine of sovereign immunity to cases where the judgment sought would expend itself on the public treasury or domain or interfere with the public administration. The Court expressly held that seizure of private property might be enjoined. Under that rule, assuming that the plaintiffs here have vested property rights which are impaired by acts of defendant Reclamation officials, no case of sovereign immunity is made out.

The clear holding of the court below is that, regardless of plaintiffs' property rights, the fact that the defendant Reclamation officials were authorized to operate the ditches and canals gave them immunity when they utilized those facilities to take away the property of the plaintiffs. The court below thus interpreted the four-judge opinion in the *Larson* case as overruling *Land* v. *Dollar.*

Our position is (1) that the four-judge opinion in the *Larson* case can be taken as the opinion of the Court only when read in the light of the concurring opinion of Mr. Justice Douglas. Without that concurring opinion it is a minority opinion. Read in connection with that concurring opinion, the *Larson* case is quite consistent with *Land* v. *Dollar.* (2) We say further that the decision of the court below is in conflict even with the four-judge opinion of Chief Justice Vinson. That opinion makes clear that if the action of the Government official is beyond his statutory authority, there can be no sovereign immunity. We have

already shown that in authorizing the defendant Reclamation officials to operate the Government-owned dams and canals, the Congress has expressly denied them any authority or discretion whatever with respect to distribution of water.

The opinion of the court below categorically asserts that Government officers are cloaked in sovereign immunity for all acts of trespass to private property for which a private employer would be liable to damage if the act of trespass had been authorized by it. In other words, authority to operate Government property is held to authorize a trespass on a private property right confirmed by the Reclamation laws. So broad a denial of judicial protection to private property presents a most important public question which this Court should review.

CONCLUSION

WHEREFORE, these petitioners respectfully pray the Supreme Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the end that this Supreme Court may review its judgment in this action.

Respectfully submitted,

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APPENDIX

ACT OF JUNE 17TH, 1902, c. 1093, § 8, 32 STAT. 390; 43 U.S.C. §§ 383, 372:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the water thereof, *Provided, That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*" (Emphasis supplied)

ACT OF FEBRUARY 21ST, 1911, c. 141, § 1, 36 STAT. 925; 43 U.S.C. § 523:

"Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under * * * the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however, That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects.* * * * *" (Emphasis supplied)

Opinion of Court Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14668

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1, ET AL., *Appellants,*

VERSUS

HOWARD E. ROBBINS, ET AL., *Appellees.*

Appeal from the United States District Court for the Western District of Texas.

(May 27, 1954.)

Before HUTCHESON, Chief Judge, and HOLMES and RIVES, Circuit Judges.

RIVES, Circuit Judge: Appellant, Hudspeth County Conservation and Reclamation District No. 1, a Texas public corporation, and five individual land owners, as representatives of all of the land owners of the Hudspeth District, as plaintiffs, brought this suit against the Regional Director and Assistant Regional Director of the Bureau of Reclamation, the Project Manager and Assistant Project Manager of the Rio Grande Reclamation Project, thirteen individuals as representatives of all land owners and water users of the Rio Grande Project, El Paso County Water Improvement District No. 1, another Texas Public corporation, and the Manager of said corporation, as defendants.[1] Plaintiffs sought a declaratory judgment to establish certain water rights of the Hudspeth land owners, and in order to protect such water rights, they sought an injunction against the officials of the Federal Bureau of Reclamation named as defendants, their successors in office, agents and employees. This appeal is by the plain-

[1] For convenience the parties will usually be referred to as plaintiffs and defendants.

tiffs from a summary judgment rendered by the District court in favor of the defendants and its refusal to render a partial summary judgment for the plaintiffs.

While the district court thus ruled with the defendants on the merits, it had overruled their motion to dismiss the action on the ground that the United States, which has not consented to be sued, is an indispensable party defendant. That question, going to the jurisdiction of the district court confronts us at the outset. We shall therefore briefly outline some of the essential facts and restate the plaintiffs' contentions sufficiently for a consideration of that jurisdictional issue.

Elephant Butte Dam and Reservoir and Caballo Dam and Reservoir are integral parts of a reclamation project known as the Rio Grande Project, which was undertaken and constructed by the Government under authority of the Reclamation Act of June 17, 1902, 32 Stat. 389, 43 U.S.C.A. 371, et seq.[2] In 1906 and 1908, the Federal Reclamation Service filed notices of intent to appropriate all the unappropriated waters of the Rio Grande River.[3]

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[2] An Act of February 25, 1905, 33 Stat. 814, provides as follows: "That the provisions of the reclamation Act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this Act to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory."

[3] As illustrative of both notices, we quote part of the 1908 notice, as follows:

"The United States acting under authority of an Act of Congress, known as the Reclamation Act, approved June 17, 1902 (32 Stat. 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called

The dams, reservoirs and irrigation works were completed to a point where, under date of November 19, 1924, Commissioner Mead of the Bureau of Reclamation wrote to the Secretary of Interior in part, as follows:

"The Hudspeth County Conservation and Reclamation District No. 1 contains an irrigable area of

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Rio Grande Project. The operation of the works in question contemplates the diversion of the water of the Rio Grande River.

"Section 40 of Chapter 49 of the laws enacted in 1907 by the 37th Legislative Assembly of the Territory of New Mexico, an Act entitled, 'An Act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial Engineer; to create a Board of Water Commissioners, and for other purposes,' approved March 19, 1907, reads as follows:

" 'Whenever the proper officers of the United States authorized by law to construct works for the utilization of waters within the Territory, shall notify the Territorial Engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory for a period of three years from the date of said notice, within which time the proper officer of the United States shall file plans for the proposed work in the office of the Territorial Engineer for his information, and *no adverse claim to the use of the water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory,* except as to such amounts of water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized; Provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the Territorial Engineer shall become public water, subject to general appropriations.'

"In pursuance of the above statute of the territory you are hereby notified that the United States intends to utilize the following described waters, to-wit:

"All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River at a point described as follows:

"Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre feet, and diversion dams below the Palomas, Rincon, Mesillas and El Paso Valleys in New Mexico and Texas."

> 20,014 acres located in the State of Texas just below the Rio Grande Federal irrigation project. The terminus of the Tornillo Main Canal of the Government project may be feasibly connected with the district canal to serve water to lands of the district. The United States will have available for disposal at the terminus of this canal certain water developed from the project, which water can be used for the irrigation of district lands. This water would be dumped into the river and lost to the project were it not utilized on lands in the Hudspeth District."

Under date of December 1, 1924, a contract was entered into between the United States of America and Hudspeth County Conservation and Reclamation District No. 1, which contract recognized that "the District contains an irrigable area of 20,014 acres located in Texas just below the Rio Grande Federal Irrigation Project." That contract provided in part, as follows:

> "The United States will deliver to the District at the terminus of the Tornillo Main canal, during the irrigation season of 1925 and thereafter during each irrigation season as established on the Rio Grande project, such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal irrigation project. In consideration of such rental the District hereby relinquishes all right, title, interest, and claim to any and all waters of the Rio Grande, except as herein provided."

An amendatory contract was entered into on April 27, 1951, which also contained the provision that "the rental of water hereunder is secondary and inferior to the right to use of water on the Rio Grande Federal Irrigation Project for any purposes." Indeed, some such provision was required by Section 1 of the Warren Act (Act of

February 21, 1911, 36 Stat. 925, 43 U.S.C.A. 523) authorizing carriage of water through reclamation facilities to independently operated irrigation districts "preserving a first right to lands and entrymen under the project."

Pursuant to these contracts, the defendant Reclamation officials and their predecessors carried water to the Hudspeth District from 1925 to 1951, and the land owners of the District used the water for irrigation purposes. Beginning in 1951, the defendant Reclamation officials have cut off deliveries of water to Hudspeth District, and some of the water so intercepted has been delivered to some farmers in El Paso and Elephant Butte Districts whose beneficial use of water is subsequent in time to that of the plaintiff Hudspeth farmers.

As their first and principal contention, the plaintiffs insist that by lawful, beneficial use of the Rio Grande water on Hudspeth lands appropriative water rights became vested as an appurtenance to such lands which cannot be limited or affected by contract with the Reclamation Bureau. That issue concerns rights to the use of water delivered to the Hudspeth District by the Reclamation officials under the contract executed in 1924 and amended in 1951.

A second and subordinate issue concerns seepage waters from lands in the El Paso District. It was necessary to drain lands in the El Paso District to keep them from becoming waterlogged. The drain water was not very desirable because of its saline character, and prior to 1951 the El Paso District made no use of these seepage waters. In 1947 a canal was constructed from the project drain outlet to the Hudspeth main canal system whereby such seepage waters might be carried directly to the Hudspeth system without discharge into the river. These drainage waters did not originally come under the 1924 contract but were included under the provisions of the amendatory contract of 1951, whereby the United States agreed to deliver such water as may be available through the dis-

tribution facilities carrying the drain or return flow waters into the Hudspeth District. The seepage waters, as well as the waters delivered to the Hudspeth District by Reclamation officials under the contract executed in 1924, were all developed waters of the Rio Grande Project made possible by that project and never received by the Hudspeth District prior to the construction by the Government of the dams, reservoirs and irrigation works. The right of the United States as storer and carrier was not exhausted when these waters had been once used, but, as recognized in the 1951 contract, that right extended to the recapture and re-use of such waters. *Nebraska* v. *Wyoming,* 325 U. S. 589, 615, n. 11.

As a third issue, the plaintiffs claim that the defendant Reclamation officials unlawfully diverted and used water for generation of hydroelectric power in derogation of the prior and superior water rights of the Hudspeth farmers, and that the District Judge should have permitted the plaintiffs to amend their pleadings to pray for injunctive relief against such diversions.[4] In connection with the irrigation of lands, the Reclamation Act (36 Stat. 930, 43 U. S. C. A. 522) provides for the development and lease of surplus power or power privileges with the proviso

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[4] This contention is clearly explained in the appellants' brief as follows:

"The diversions for power are brought about in this way. Caballo Dam was completed about 20 miles downstream from Elephant Butte Dam in 1938. At the same time a power house and power generation facilities were constructed at Elephant Butte Dam. The practice of the defendant Reclamation officials is to release water from Elephant Butte Dam, thereby generating hydro electric power at the Elephant Butte facilities, and catch the waters so released in Caballo Reservoir, whence they are subsequently released for irrigation as needed. But the result of this practice is to spread out over two reservoirs the waters which would otherwise have been confined in only one reservoir.

"The spreading out of impounded waters over the area of two reservoirs causes much greater losses through evaporation and seepage than would result if the water were impounded in only one reservoir."

"that no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project."

The authority of the United States to construct, maintain and operate the dams, reservoirs and irrigation facilities is unquestioned. One of the purposes is to fulfill a treaty obligation to the Republic of Mexico.[5] Another purpose is to irrigate certain arid lands in New Mexico and Texas and thus to promote the general welfare.

> "* * * the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation." United States v. Gerlach Live Stock Co., 339 U. S. 725, 738.

The plaintiffs' position on all three contentions seems to be that the actions of the defendant Reclamation officials are ultra vires their statutory authority and, therefore, may be made the object of injunctive relief. That position is based upon the contention that the Hudspeth land owners had acquired rights to use the water for irrigating their lands which were vested property rights appurtenant to their lands and wholly distinct from the interest of the Government in the irrigation works.

It seems clear that the United States, by filing the notices of intent to appropriate and thereafter impounding the water, did not become the owner of the water in its own right. That is recognized in the Reclamation Act itself, Section 8 of which provides (32 Stat. 390, 43 U. S. C. A. 372):

> "*Water right as appurtenant to land and extent of right.* The right to the use of water acquired un-

[5] By the Convention of May 21, 1906, between the United States and Mexico, 34 Stat. 2953, the United States is obligated to deliver to Mexico at Juarez 60,000 acre feet of water annually from the Rio Grande, with proportionate diminution of this amount in case of accident or extreme drought.

der the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

A further provision of Section 8 of the Act is brought forward as 43 U. S. C. A. 383:

> "*Vested rights and State laws unaffected by chapter.* Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

Accordingly, it was said in *Ickes* v. *Fox, et al.*, 300 U. S. 82, 94, 95, and quoted in *Nebraska* v. *Wyoming*, 325 U. S. 589, 614:

> "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare Murphy v. Kerr, 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (ibid.), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works."

Plaintiffs insist that the decision in *Ickes* v. *Fox, et al., supra,* is determinative to the effect that the United States is not an indispensable party defendant. There Mr. Ickes, Secretary of the Interior, made the same contention and the Court in answering it said:

> "The fallacy of the contention is apparent, because the thus-far undenied allegations of the bill, as already appears, demonstrate that respondents have fully discharged all their contractual obligations; that their water-rights have become vested; and that ownership is in them and not in the United States. The motion to dismiss concedes the truth of these allegations; but even if they were denied, we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them. United States v. Lee, 106 U. S. 196, 218, 219; cf. Tindal v. Wesley, 167 U. S. 204, 213 et seq.
> • • •
> "The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: Noble v. Union River Logging R. Co., 147 U. S. 165, 171-2, 176; Philadelphia Co. v. Stimson, 223 U. S. 605, 619; Goltra v. Weeks, 271 U. S. 536, 544; Work v. Louisiana, 269 U. S. 250, 254; Payne v. Central Pacific Ry. Co., 255 U. S. 228, 238. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the *Stimson* case:
> " 'If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they

have wrongfully invaded . . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process . . .

" 'The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.' " (300 U. S. at pp. 96-97)

An important distinction, we think, is that the plaintiffs in that case were land owners within the Yakima Reclamation Project and not Warren Act contractors, as here.[6] It may be that in the *Ickes* v. *Fox* case, *supra*, the Secretary's acts were so clearly in excess of his statutory authority as to be ultra vires, but that is not true here where the officials are acting under the provisions both of the Warren Act (43 U. S. C. A. 523) and of the contracts to preserve a first right to lands under the project. Again in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 702, n. 26, it is noted that the ground for decision in *Ickes* v. *Fox, supra*, is not altogether clear:

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[6] The plaintiffs insist that they must be treated on a parity with land owners within the Rio Grande Project because no geographic boundaries to that project were ever defined by any formal order, and the notices of intent to appropriate (see footnote 1, supra) are broad enough to include the Hudspeth lands lying in the El Paso Valley. We think, however, that the notices are not susceptible of the construction that the project includes *all* the lands in the El Paso Valley, that the notices are expressly filed in connection with the Rio Grande Project, that before the rights claimed by the plaintiffs could have been acquired that Project had been sufficiently identified by contracts of June 15, 1918 with Elephant Butte Irrigation District and of January 17, 1920 with El Paso County Water Improvement District No. 1, and, finally, that the Hudspeth District in its contract of December 1, 1924 recognized that the Hudspeth lands were "located in Texas *just below* the Rio Grande Federal Irrigation Project." The Act of February 25, 1905, footnote 2, supra, clearly left the boundaries of the Project to be ascertained, and just as clearly the Secretary of Interior had a reasonable discretion to ascertain what lands lay within the Project. See 43 U.S.C.A. 373.

"The ground for decision in *Ickes* v. *Fox* is not altogether clear. The argument was made in that case that the Secretary of the Interior had no statutory power to overrule a determination of the rights of the plaintiffs made by his predecessor in office. 300 U. S. at 86. The tortious injury to the plaintiffs was also argued, in reliance on *Goltra* v. *Weeks*, as a basis for avoiding the sovereign's immunity. The Court appears to have relied on both grounds without indicating which was controlling. It said: 'The suits . . . are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but *settled and determined by his predecessors in office*' (emphasis added). Id. at 96-97. In support of the conclusion that the suit could be maintained, the Court relied first on *Noble* v. *Union Logging R. Co.*, 147 U. S. 165 (1893), a decision resting entirely on the officer's lack of statutory power to overrule the decision of his predecessor."

In the case at bar, the predecessors in office to the Reclamation officials had in the 1924 contract treated the plaintiffs' rights as secondary and inferior to the rights of the land owners of the Rio Grande Project and that was repeated by the present officeholders in the 1951 contract. The rationale of *Goltra* v. *Weeks, supra,* was expressly disapproved in *Larson* v. *Domestic & Foreign Corp., supra,* and the Court laid down a contrary doctrine:

"We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign." (337 U. S. at p. 695)

Applying that test, it seems clear to us that if the dams, reservoirs and irrigation facilities had been owned by a private corporation whose managers and agents had violated the rights of the plaintiffs in the manner contended in this suit, the private corporation could not escape liability for damages on the ground that its employees were acting outside the scope of their authority.

Since *Larson* v. *Domestic & Foreign Corp., supra,* a very strict test must be applied when the suit is one not for damage but for specific relief, such as injunction either directing or restraining the defendant officers' actions (see 337 U. S. 688). These dams, reservoirs and all other project facilities are owned by the United States, which operates them through the Bureau of Reclamation. See 43 U. S. C. A. 498. Their operation depends upon the flow of water. Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment (see *Lynn* v. *United States,* 5th Cir., 110 F. 2d 586, 588) or by injunction against Government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress. In a case involving this same project, the Tenth Circuit arrived at the conclusion that the action was in essence a suit against the United States to which it had not consented and that it, therefore, must fail. *State of New Mexico* v. *Backer,* 10th Cir., 199 F. 2d 426. We entertain the same opinion here. It results that the summary judgment on the merits for the defendants must be reversed and the cause remanded with directions to dismiss the complaint for want of jurisdiction.

Reversed and Remanded With Directions.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 238

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1, ET AL.,

Petitioners,

V.

HOWARD E. ROBBINS, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Treaty And Statutes Involved

The Convention of May 21, 1906, between the United States and Mexico, (34 Stat. 2953), the Reclamation Act of June 17, 1902, (32 Stat. 388), the Act of February 25, 1905, (33 Stat. 814), extending the Reclamation Act to part of the State of Texas, the Bureau of Reclamation part of the Interior Department Appropriation Act of August 9, 1937, for the fiscal year 1938, (50 Stat. 564, 593), and the Warren Act of February 21, 1911, (36 Stat. 925), are all involved and all or the pertinent parts of each are set forth at length in Appendices to this brief.

Question Presented

The only question presented to this Court at this point of the proceedings is whether the United States, which has not consented to be sued herein, is an indispensable party to this suit.

Statement Of The Case

Petitioners' Statement of the Case is so incorrect and so irrelevant to the present issue that it fails fairly to set forth the real background of the matter upon which this Court is requested to pass, and we do not accept it.

Petitioner, Hudspeth County Conservation and Reclamation District No. 1, with the other Petitioners as individuals, brought this suit against the Respondents Robbins, Thompson, Fiock, and Resch as the Bureau of Reclamation agents operating the Rio Grande Federal Reclamation Project, together with the other Respondents herein, thirteen of whom were alleged to be representatives of all landowners and water users of the Rio Grande Project, the remaining Respondents being El Paso County Water Improvement District No. 1, a water district organized under the laws of the State of Texas for the purpose, among others, of contracting with the United States with respect to the water supply of El Paso County lands within the Rio Grande Project, and its manager.

As disclosed by the Complaint, (R. 19-52), the action is one attempting to enforce upon all of the Respondents, (defendants below), by declaratory judgment, the Petitioners' interpretation of a contract dated the first day of December, 1924 between the United States of America on the one part and Petitioner Hudspeth County Conservation and Reclamation District No. 1, on the other part, as modified by a supplemental contract between the same parties dated the 27th

day of April, 1951, and to compel the defendant Bureau of Reclamation officials by injunction to abide by such interpretation and so manage the facilities of the Rio Grande Project as to conform its operations to such interpretation.

Neither the United States nor the Secretary of the Interior is a party to the suit.

In the initial phases of the litigation Respondents, by motion to dismiss the action, (R. 74), presented to the trial court the question of indispensability of the United States as a party, which, as applied to Petitioners' amended complaint was overruled, (R. 84), and the same matters were again presented by answer, (R. 85, 86), which the Court disregarded but nevertheless rendered summary judgment for Respondents on the merits, (R. 247).

On appeal by Petitioners to the United States Court of Appeals for the Fifth Circuit, that Court did not pass upon the merits of the case at all, but held that the United States is an indispensable party and "that the summary judgment on the merits for the defendants must be reversed and the cause remanded with directions to dismiss the complaint for want of jurisdiction." (See opinion below, Petition A22, A33).

Accordingly, as we understand the practice and procedure before this Court, the only question presented is whether this Court believes that the decision of the Court of Appeals on the issue of indispensability of the United States as a party is one which this Court should now review.

Argument

The United States is an indispensable party. In support of this statement we feel that it is necessary to point out for consideration certain facts disclosed by the record.

Elephant Butte Dam and Reservoir and Caballo Dam and Reservoir are integral parts of the reclamation project known as the Rio Grande Project which was undertaken and constructed by the Government under Act of June 17, 1902 (32 Stat. 388, set out in full in Appendix A *post,* p. 15). The purposes of these dams and reservoirs are to fulfill a treaty obligation to the Republic of Mexico[1] and to irrigate something less than 190,000 acres of arid lands in New Mexico and Texas, which can be accomplished only by storage of waters of the Rio Grande.

These dams, reservoirs and all other project facilities are owned by the United States which through the Bureau of Reclamation, operates them.[2]

In conformity with special statutes of Territorial New Mexico, (recited in the notices themselves), in order to provide a water supply for the Rio Grande Project, the United States, by notice dated January 23, 1906, a copy of which is attached as Exhibit D to plaintiffs' First Amended Complaint, (R. 69), secured the appropriation of 730,000 acre feet of water annually from the Rio Grande by way of direct diversion or storage.

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[1]By the Convention of May 21, 1906, between the United States and Mexico, 34 Stat. 2953, (Appendix B, *post,* p. 20) the United States is obligated to deliver to Mexico at Juarez 60,000 acre feet of water annually from the Rio Grande, with proportionate diminution of this amount in case of accident or extreme drought.

[2]Section 6 of the Reclamation Act, Appendix A, *post,* p. 15, provides that "the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until othewise provided by Congress."

The Reclamation Act was extended by Act of February 25, 1905, (33 Stat. 814, Appendix C, *post,* p. 22), to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, New Mexico, and later to the entire State.

Thereafter by supplemental notice of April__, 1908, it acquired the enlarged right to "all the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River," with storage to be about nine miles west of Engle, New Mexico, a location now known as Elephant Butte Reservoir, and diversions below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas, as more fully shown in Exhibit E attached to Plaintiffs' First Amended Complaint, (R. 71).

Here we pause long enough to point out that Petitioners' assertion in paragraph 2 on page 2 of the Petition, repeated on page 4, that in 1906 and 1908 the Reclamation officials filed Notices of Intent to Appropriate waters of the Rio Grande for use in an area embracing all the land in the Hudspeth District is not correct and is contrary to the record, for an inspection of the Notices, (R. 69-70 and R. 71-72), shows that what these notices expressly say is that they are *"in connection with the so-called Rio Grande Project."* (Emphasis added.)

It is conclusively established by the Record that Petitioners are not and never were any part of the Rio Grande Project. Paragraph 4 of the Complaint, (R. 24), alleges that the "Hudspeth District embraces 30 square miles of land in the extreme southwesterly portion of Hudspeth County, Texas, commencing at the El Paso-Hudspeth County line," and paragraph 5 recites that "The Rio Grande Project is a United States reclamation project and includes lands within Sierra and Dona Ana Counties, New Mexico and El Paso County, Texas."

Paragraph 2 of the contract of December 1, 1924, which was signed by the Hudspeth District states that "The District contains an irrigable area of 20,014 acres, located in Texas, *just below* the Rio Grande Federal Irrigation Project," (R. 53). (Emphasis added.)

The depositions and exhibits making up the bulk of the record are quite voluminous, and aside from the matters singled out and specifically cited above, when read as a whole unquestionably show that the Hudspeth District lands have never been assessed for any part of the construction costs of the Project and have never been included within it.

The filings of 1906 and 1908 were made pursuant to the authority of the Reclamation Act, and under that Act they were limited to the benefit of those lands constituting the reclamation project whose existence made practical the construction of the contemplated reservoir, dams, and other facilities, the cost of which was to be borne by all of the irrigable lands within its limits: *Swigart v. Baker,* 229 U. S. 187, 57 L. Ed. 1143.

In 1906 and 1908 irrigation in Hudspeth County was non-existent. As late as the year 1920 the area now within the Hudspeth County Conservation and Reclamation District No. 1 had only 1,011 acres under irrigation, (R. 552), and the District was not even organized until August 6, 1923, (R. 558).

Having secured the appropriations of waters of the Rio Grande in the manner above stated, the United States, in furtherance of the Rio Grande Project, shut off the normal flow of the river in New Mexico by impounding it and all flood waters behind Elephant Butte Dam. This it had the right to do. *United States v. Gerlach Livestock Company,* 339 U. S. 725, 94 L. Ed. 1231. Any claims by persons alleged to have been injured by this exercise of federal power should have been made at that time against the government in the Court of Claims as was done in that case. However, landowners in the Hudspeth area could not have shown any damages then, because there was no irrigated land there to be injured. They certainly are in no position to develop an

area after the dam was built by using return flow waters and then claim that the area was damaged by construction of the dam.

We have never suggested that the United States, by filing the notices and impounding the water, became the owner thereof in gross in its own right, but we do say that it held the water for the benefit of the *landowners of the Rio Grande Project* who contracted with the United State for repayment of construction costs, and the Government could not dispose of that water to some organization whose lands are not assessed for such costs, to the detriment of the Project which is paying the bill. Section 8 of the Reclamation Act makes the water appurtenant to the lands of the Project.

The Act of February 25, 1905, 33 Stat. 814, (Appendix C, *post,* p. 22), extending the Reclamation Act to part of Texas provided that "if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as a part of the general system or irrigation, should all other conditions as regards feasibility be found satisfactory."

That specific authorization, coupled with that found in Section 2, 4 and 10 of the Reclamation Act, (Appendix A, *post,* p. 15), definitely left the boundaries of the Rio Grande Project to be determined within the sound discretion of the Secretary of the Interior.

This he undoubtedly did, as the Project developed, by means of contract of June 15, 1918, with the Elephant Butte Irrigation District establishing that District as the New

Mexico unit of the Project, and superseding previous agreements, (R. 615-624), and by contract of January 17, 1920 with El Paso County Water Improvement District No. 1, establishing that District as the Texas unit of the Project, superseding previous agreements, (R. 559-570).

The Bureau of Reclamation part of the Interior Department Appropriation Act of August 9, 1937, for the fiscal year 1938, 50 Stat. 564, 593, (Appendix D, *post,* p. 22), allotted $350,000.00 for operation and maintenance of the project and provided for the Secretary of the Interior to enter into contracts with El Paso County Water Improvement District No. 1 and Elephant Butte Irrigation District relieving them of the payment of construction costs chargeable to development of electric power by the United States at Elephant Butte Dam, which specific authority the Secretary exercised by making a contract with the El Paso District on November 10, 1937, (R. 570-592), and by making a contract with the Elephant Butte District on November 9, 1937, (R. 625-646).

The Record thus shows the continued operation of a vast federal reclamation project by the Secretary of the Interior under direct federal statutory authority over a period of more than thirty years.

On February 21, 1911, the Congress passed the Warren Act, 36 Stat. 925 (Appendix E, *post,* p. 23), which provided that whenever *storage or* carrying capacity is in excess of the requirements of *project* lands, the Secretary of the Interior *"preserving a first right to lands and entrymen under the project,* is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the *impounding, storage, and carriage* of water to an extent not exceeding such excess capacity" with irrigation districts and others named in the Act. (Emphasis added.)

Under authority of the original Reclamation Act and particularly that given by the Warren Act, the United States entered into the written contract with Petitioner Hudspeth County Conservation and Reclamation District No. 1, dated the first day of December 1924, and later pursuant to the same authority on the 27th day of April 1951 entered into an amendatory contract with the District. The contract of December 1, 1924, as modified by that of April 27, 1951, forms the basis of this suit, and both contracts are set out as Exhibits B and C, respectively, attached to the Complaint and are shown at length in R. 53-59, and R. 60-69.

The Complaint alleges that while the contract as written does not say so, it was intended that the Hudspeth District should have certain water rights which plaintiffs proceed in the Complaint to enumerate, (Paragraphs 10 to 14 of Complaint, R. 29-32).

Similar allegations with reference to the amendatory contract of April 27, 1951, are made in paragraph 30 of the Complaint, (R. 41-42), which proceeds with the allegation that the contract as interpreted by the plaintiffs has been violated, and ends with a prayer that the Court enter a declaratory judgment establishing the rights of the parties under the contract of December 1, 1924, as modified by the later amendatory contract, to be as contended for by plaintiffs and that the Bureau of Reclamation officials in charge of the Project, and their agents and employees be enjoined from operating the Project in a manner contrary to the alleged rights of plaintiffs, (R. 49-51).

The United States is obviously an indispensable party to this proceeding because Petitioners are asking that the Government's rights and liabilities under the written contract be determined, and that the Bureau of Reclamation officials be commanded by the Court to operate the Rio

Grande Project in the manner in which the Court determines that it should be operated, thus substituting the Court's discretion for that of the Secretary of the Interior where discretion is vested by Act of Congress, and all of this without any showing of what its impact would be on the obligation of the United States to deliver to Mexico 60,000 acre feet of water per annum under the Convention of May 21, 1906, to which reference previously has been made.

I.

The Decision Below Is Clearly Correct

Quite recently it has been held by the Tenth Court of Appeals that the Rio Grande Reclamation Project was constructed and operated in the exercise of a proper governmental function in accordance with valid statutes of the United States, and that the management, control and operation of its facilities are given to the Secretary of the Interior in broad terms by the Reclamation Act. *New Mexico, et al. v. Backer,* 199 F.2d, 426, 428, (1952). The very same project was involved in that case as is involved here, and that, too, was a suit against a Bureau of Reclamation official, in charge of Elephant Butte Dam and Reservoir, to restrain him from reducing the water level of the reservoir to a point which would kill the fish in the reservoir and thereby create a health menace to a nearby town. The holding in that case was that an action wherein it was sought to restrict and enjoin the operation and use of reclamation facilities owned and operated by the United States, to which suit neither the United States nor the Secretary of the Interior was a party, was properly dismissed for lack of jurisdiction, because it was a suit against the Government.

In the present suit there are stronger reasons for requiring the presence of the United States as a party than there were in the *New Mexico v. Backer* case, because here is a contract

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with the United States which plantiffs sought to enforce against the United States by injunction against subordinate officials, and not only that but to enforce it as construed by plaintiffs, whereas in the Backer case no contract at all existed. No decision has been found by us holding that the rights or liabilities of either party under a written bilateral contract, as against the other, may be determined by a suit brought by one of the parties without the presence in court of the other. The cases are to the contrary. *Shields v. Barrow,* 17 How. 130, 139, *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197, 233, *Comonwealth Trust Co. v. Smith,* 266 U. S 159, *Balter v. Ickes,* 89 Fed. 856, App. D. C., Cert. den. 301 U. S. 709.

In *Green v. Brophy,* 110 F. 2d 539, 541, Mrs. Justice Vinson writing the opinion of the Court said: ". . . . litigation requiring decision as to the legal consequences to be attached to a relationship where only one party to the relationship is made a party to the action is perhaps the *clearest case of failure to join an indispensable party.*" (Emphasis added).

II.

There Is No Conflict Of Decision

There is no conflict between the ruling of the Court below and that of this Court in *Ickes v. Fox,* 300 U. S. 82, as claimed p. 8, Petition, because, first, the facts and circumstances are totally dissimilar, in that in the *Ickes-Fox* case the complaining individuals were all landowners within a federal reclamation project who had contracted to reimburse the Government for construction costs at the rate fixed by a former Secretary of the Interior when the project was promoted and there was no contract between plaintiffs and the United States which plaintiffs were seeking to enforce. This Court held that the appropriation of water by the Government did not vest title in it, but that the appropriation was for

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the benefit of the landowners of the project who could not be compelled by a subsequent Secretary of the Interior to pay more than the amount of construction charges originally agreed upon in order to get enough water for their lands. The theory of that case is that water of a federal project belongs to the landowners who make up the project and contract to repay the construction costs to the Government.

This Court held in that case that the United States was not an indispensable party to a suit against the Secretary of the Interior to restrain him from putting into effect an unlawful order in derogation of a prior agreement, which is quite different from holding that the United States is not an indispensable party to a suit to determine what its rights and obligations are under a written contract, and to require the Secretary of the Interior to operate a federal reclamation project in the manner determined by the Court rather than in the exercise of the right of management vested in him by the Congress.

Furthermore, this Court, since then has re-examined the entire body of its decisions relating to suits against government officers in *Larson v. Domestic and Foreign Commerce Corporation,* 337 U. S. 682, 701, 702 (1949), whereinit was stated that there are only two classes of cases in which restraint may be obtained against the conduct of government officials, one being where the officer is acting beyond his delegated power, and the other where the statute or order conferring power upon the officer to act in the sovreign's name is unconstitutional, and the Court further held that in a suit against a public officer for acts alleged to be in excess of authority, there must be *an entire lack of athority.* No such condition exists here.

In discussing prior decisions thought to be contrary to the holding of the Court therein the *Ickes-Fox* case was considered (337 U. S. 702-703, Note 26) and overruled insofar

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as it was in conflict with the holding of the Larson case, which was that a suit for injunctive relief against a government official who executed a contract in behalf of the United States, based on such contract, is in effect a suit against the sovereign and, therefore, must fail where the sovereign is not a party to the suit by its consent.

The holding of the Court of Appeals in this case is not in conflict with either *Nebraska v. Wyoming,* 325 U. S. 589, or *Ramshorn Ditch Co. v. United States,* 269 Fed. 80, p. 8, Petition, because in neither of those cases is the question of indispensability of the United States as a party decided or even raised, and the facts are quite dissimilar when compared with those in *Land v. Dollar,* 330 U. S. 731, and *U. S. v. Lee,* 106 U. S. 196, mentioned in the Petition on page 19.

III.

There Is No Important Question of Federal Law

The decision of the Court of Appeals presents no important question of federal law to be reviewed by this Court for the holding of the court below is in conformity with the law as established by other Courts of Appeals and by this Court over a period of many years with reference to indispensability of parties where suit is brought to enforce contract rights, and so far as suits against government officials is concerned this Court has already reviewed the body of its prior decisions and restated the law on the basis of such review in *Larson v. Domestic and Foreign Commerce Corporation.*

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CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

The Reclamation Act of June 17, 1902, 32 Stat. 388, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided,* That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an Act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in

the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

Sec. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation for said works; *Provided,* That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans and estimates of cost, the Secretary of the Interior shall determine whether or not said project

is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided; *Provided,* That the commutation provisions of the homestead laws shall not apply to entries made under this Act.

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided,* That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act.

Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided,* That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management

and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Sec. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the the sale of public

lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided,* That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

APPENDIX B

The pertinent parts of the Convention of May 21, 1906, between the United States and Mexico, 34 Stat. 2953, are as follows:

ARTICLE I.

After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, know as the Old Mexican Canal, now exist above the city of Juarez, Mexico.

ARTICLE II.

The delivery of the said amount of water shall be assured by the United States and shall be distributed through the year in the same proportions as the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicinity of El Paso, Texas, according to the following schedule, as nearly as may be possible:

	Acre feet per month	*Corresponding cubic feet of water.*
January	0	0
February	1,090	47,480,400
March	5,460	237,837,600
April	12,000	522,720,000
May	12,000	522,720,000
June	12,000	522,720,000
July	8,180	356,320,800
August	4,370	190,357,200
September	3,270	142,441,200
October	1,090	47,480,400
November	540	23,522,400
December	0	0
Total for the year	60,000 *acre feet*	2,613,600,000 *cubic feet*

In case, however, of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States.

ARTICLE III.

The said delivery shall be made without cost to Mexico, and the United States agrees to pay the whole cost of storing the said quantity of water to be delivered to Mexico,

of conveying the same to the international line, of measuring the said water, and of delivering it in the river bed above the head of the Mexican Canal. It is understood that the United States assumes no obligation beyond the delivering of the water in the bed of the river above the head of the Mexican Canal.

APPENDIX C

The Act of February 25, 1905, 33 Stat. 814, relating to the construction of what is now called Elephant Butte Dam reads:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the provisions of the reclamation Act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this Act to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory.

APPENDIX D

The following is the pertinent portion of the Interior Department Appropriation Act for the fiscal year 1938, 50 Stat. 564, 593:

Rio Grande project, New Mexico-Texas: For operation and maintenance, $350,000: *Provided,* That the Secretary of the Interior is hereby authorized to enter into a contract with the El Paso County Water Improvement District Numbered 1 and the Elephant Butte Irrigation District of New Mexico by which the districts will be relieved of the obligation of making payment of the construction cost chargeable to the development of power of Elephant Butte Dam in the amount determined as equitable by the Secretary of the Interior in return for the conveyance by the said two districts to the United States of all the districts' right, title, interest, and estate in the use of said dam and other project works including the project water supply, for the development of hydroelectric energy: *Provided further,* That in such contracts it shall be stated that the use of the dam, project works, and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: *Provided further,* That the net earnings of the power plant and system belonging to the United States and any other available revenues shall be applied, until the cost thereof has been met, upon the cost of the power development, including (1) the cost of power facilities, (2) the amount invested, as herein authorized, in the cost of Elephant Butte Dam, and (3) the amount invested by the Bureau of Reclamation in Caballo Dam: *Provided further,* That after the cost of the power development has been met the net earnings of the power plant and system shall be disposed of as Congress may direct.

APPENDIX E

The Warren Act of February 21, 1911, 36 Stat. 925 (Ch. 141) is as follows:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRSENTATIVES OF THE UNITED STATES

OF AMERICA IN CONGRESS ASSEMBLED, That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: PROVIDED, HOWEVER, That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individuals so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

Sec. 2. That in carrying out the provisions of said reclamation Act and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: PROVIDED, That the title to and management of the works so constructed shall be subject to the provisions of section six of said Act: PROVIDED FURTHER, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: PROVIDED, That nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

Sec. 3. That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the reclamation Act and the Acts amendatory thereof or supplementary thereto.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 238

HUDSPETH COUNTY CONSERVATION & RECLAMATION DISTRICT No. 1, ET AL., *Petitioners*

v.

HOWARD E. ROBBINS, ET AL., *Respondents*

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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August, 1954

PRESS OF BYRON S. ADAMS, WASHINGTON, D C

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That the petition in this case presents a question of importance is clear from respondents' opposition brief. It attempts to distinguish *Ickes* v. *Fox*, 300 U.S. 82, by asserting that petitioners here can seek only specific performance of a contract with the government. This assertion necessarily presupposes that the Hudspeth farmers have no vested property rights to enforce by virtue of their beneficial use.

Exactly the same contention was made in *Ickes* v. *Fox*, and was rejected by this Court. In *Ickes* v. *Fox*, the Court

held that by beneficial use of water the farmers acquired vested property rights to the continued use thereof; that a suit to enforce water rights is not a suit for specific performance of a contract; and that the United States is not an indispensable party to such a suit.

The Court of Appeals distinguished *Ickes* v. *Fox* by holding that the opinion of the *Fox* case does not apply to protect farmers within Warren Act districts. Pet. for Cert. pp. A30-31. This is exactly the holding from which springs the first question presented in the petition:

> Are water rights of Warren Act farmers of inferior character and dignity to those of Reclamation "Project" farmers in that the former may be limited or destroyed by a Government contract?

To illustrate the importance of this question: In 1952, a total of more than 2,300,000 acres "outside Project Boundaries"—an area almost as large as the entire State of Connecticut—was irrigated through Reclamation "Bureau works under Warren Act or other water service contracts." This area was about 40% of the total acreage irrigated through Reclamation Project works. BUR. OF REC., 1952 CROP SUMMARY AND RELATED DATA, FEDERAL RECLAMATION PROJECTS (1953), Tables 2, 3.

CONCLUSION

WHEREFORE, these petitioners submit that a writ of certiorari should issue.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 238

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1, ET AL., PETITIONERS

v.

HOWARD E. ROBBINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ADDITIONAL BRIEF FOR THE GOVERNMENT RESPONDENTS HOWARD E. ROBBINS, A. N. THOMPSON, L. R. FIOCK, AND W. F. RESCH IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (Pet. A22-A33) is reported at 213 F.2d 425.

JURISDICTION

The judgment of the court of appeals was entered May 27, 1954 (R. 663). The petition for a writ of certiorari was filed on July 23, 1954. The

jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the United States is an indispensable party to a suit against federal reclamation officers which seeks an adjudication that, under a Warren Act contract with the United States, the plaintiffs acquired vested property rights in water, and which seeks to restrain the officers from disposing of the water contrary to the plaintiffs' views.

STATEMENT

This case concerns the waters of the Rio Grande River, an interstate and an international waterway.[1] By the Convention of May 21, 1906, between the United States and Mexico, 34 Stat. 2953, the United States is obligated to furnish to Mexico 60,000 acre-feet of water annually from the river, with proportionate diminution in case of accident or extreme drought. To serve this purpose and to provide irrigation water for lands in New Mexico and Texas, the United States developed the Rio Grande Reclamation project, the primary facility being the Elephant Butte Dam and Reservoir in New Mexico.[2]

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[1] Compare *Texas* v. *New Mexico*, No. 9, Orig., now pending on exceptions to the report of the Special Master.

[2] The project was authorized by the Act of February 25, 1905, 33 Stat. 814, which extended the Reclamation Act of June 17, 1902, 32 Stat. 388, to Texas and empowered the Secretary, if in his judgment a feasible project could be developed, to construct a dam on the Rio Grande "as part of the general system of irrigation."

In furtherance of the project, the United States, by notices filed in 1906 and 1908 in New Mexico, appropriated all unappropriated waters of the Rio Grande (R. 69-74). The project itself comprises two irrigation districts, the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. These districts have been repaying construction costs of the project as required by section 4 of the Reclamation Act of June 17, 1902, 32 Stat. 388, and by the contracts between the United States with each district (R. 559-570, 615-624). The Act of August 9, 1937, 50 Stat. 564, 593, authorized the Secretary of the Interior to negotiate agreements with the two districts relieving them of the obligation to pay construction costs chargeable to the development of electric power at Elephant Butte Dam, and this was done (R. 574-575, 628-629).

Petitioner Hudspeth County Conservation and Reclamation District No. 1, which is indisputably not within the project itself, entered into a Warren Act contract with the United States on December 1, 1924, and into an amendatory contract on April 27, 1951 (R. 53, 60). The Warren Act of February 21, 1911, c. 141, section 1, 36 Stat. 925, 43 U. S. C. 523, is set out in the petition (A21). In brief, it authorized the Secretary, when storage or carrying capacity exceeded the requirements of project lands, to contract with others, outside the project, for the storage and carriage of water, "*preserving*

a first right to lands and entrymen under the project" (emphasis added). Paragraph 2 of the 1924 contract contained the recital that Hudspeth is "located in Texas just below the Rio Grande Federal Irrigation Project" (R. 53). Paragraph 6 contained these provisions:—the United States agreed to deliver "such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal irrigation project. In consideration of such rental the District [*i.e.* Hudspeth] hereby relinquishes all right, title, interest, and claim to any and all waters of the Rio Grande, except as herein provided." (R. 54.) Like provisions were contained in the 1951 amendatory contract which also made the Secretary of the Interior arbiter of all disputes (R. 62, 67).

In early 1951, due to prolonged drought in the Rio Grande watershed and the increased recapture and re-use of waters by the owners of project lands, little or no water was reaching Hudspeth.[3] As

[3] The seriousness of the drought condition at that time was reflected at the other end of the Rio Grande Project when the level of water in Elephant Butte Dam and Reservoir had fallen to such a degree that the State of New Mexico sued reclamation officials to restrain them from further releasing the water, on grounds that a health menace would result. That action, like this one, was dismissed as being a suit against the United States. *State of New Mexico* v. *Backer*, 199 F.2d 426 (C.A. 10). See also *Texas* v. *Mexico*, No. 9, Orig., footnote 1, *supra*, p. 2.

contemplated by the 1951 contract, this conflict between Hudspeth and owners of project lands was, in March 1951, presented to the Secretary of the Interior by Hudspeth's officials (R. 176-180). And in April 1951, the Secretary indicated that owners of project lands had a legal right to re-use return flow water, concluding: "Although I am in sympathy with your position, I must recognize the existence of primary rights in the El Paso District [a component of the Rio Grande reclamation project, *supra,* p. 3] to the extent available project waters are required for beneficial use on that District's land" (R. 182-184).

Thereafter, this action was instituted by Hudspeth and five individual landowners, as representatives of all landowners in the Hudspeth District, against four Bureau of Reclamation officials who administer the project under direction of the Secretary of the Interior, thirteen individuals as representatives of landowners in the El Paso District, and El Paso County Water Improvement District No. 1. The relief sought (R. 49-51) is well summarized by the court of appeals (Pet. A22): "Plaintiffs sought a declaratory judgment to establish certain water rights of the Hudspeth land owners, and in order to protect such water rights, they sought an injunction against the officials of the Federal Bureau of Reclamation named as defendants, their successors in office, agents and employees."

The defendants filed a motion to dismiss the complaint, the first ground of which was that the

action was in substance and effect an action against the United States, which has not consented to be sued (R. 74). The district court overruled this motion (R. 82). Subsequently, the court granted the defendants' motion for summary judgment on the merits and dismissed the action (R. 247-251). On petitioners' appeal, the court below ruled that the action was in fact a suit against the United States to which the Government has not consented. Accordingly, it reversed the summary judgment on the merits for the defendants and remanded the cause with directions to dismiss the complaint for want of jurisdiction (Pet. A22-A33).

ARGUMENT

1. The court of appeals (Pet. A31-A33) correctly rested its conclusion that this action is in substance and effect a suit against the United States squarely on this Court's decision in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682. That case and the instant one present practically identical situations. There the corporation sued the War Assets Administrator for a judicial determination that, under a contract between it and the Government, title to government coal had passed, and to enjoin the official from selling the coal to anyone else. The officer had taken the position that title had not passed and that the contract had been breached by the plaintiff. Here, petitioner's rights hinge on Hudspeth's Warren Act contracts, and they seek a judicial declaration that they have acquired vested rights to waters of the Rio Grande there-

under and also seek an injunction restraining the defendant government officials from making other disposition of the water until petitioners' asserted rights have been satisfied. As in *Larson,* the Government has taken the position that petitioners' contract rights have not been breached or invaded.

In *Larson,* the Court held that, if the action of the official is within his statutory power, it is of no moment that his action may be erroneous or that under general law it would be tortious, stating (337 U. S. at 695): "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency." Since the War Assets Administrator's actions did not exceed his authority (337 U. S. at 691-695), the suit was held to be against the United States.

There can be no question of the authority of the Secretary of the Interior and his agents with respect to the actions challenged by petitioners. In the more than fifty years that have elapsed since the Government entered the reclamation field, the Secretary's authority to initiate, construct, and administer the program and facilities has been complete. Reclamation Act of June 17, 1902, section 10, 32 Stat. 388, 390. The Warren Act added to that general authority and did not detract from it. In the *Larson* case, the War Assets Administrator "was empowered by the sovereign to administer

a general sales program encompassing the negotiation of contracts" and, as this Court noted (p. 692), "A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell." The Administrator's action in passing upon Foreign & Domestic Corporation's claim under the contract was, thus, within his authority. So here, the Warren Act clothed the Secretary of the Interior with equally complete authority to negotiate contracts for the disposal of water to non-project landowners, specifically providing that a "first right" was to be preserved for lands and entrymen under the project. Hence, his action in determining that Hudspeth's rights under its contract are subordinate to the rights of project lands is likewise clearly within his statutory authority. Petitioners' assertion (Pet. 9-10) that the decision of the court of appeals has gone farther than did this Court in the *Larson* case is therefore without foundation. Rather, the ruling below accords fully with *Larson* and also with the views of the Tenth Circuit, the other appellate court with jurisdiction over the area of the Rio Grande project. *State of New Mexico* v. *Backer,* 199 F. 2d 426, see fn. 3, *supra,* p. 4; cf. *United States* v. *United States District Court,* 206 F. 2d 303 (C. A. 9).

2. In relying on *Ickes* v. *Fox,* 300 U. S. 82 (Pet. 2, 3, 4, 5, 8, 12-13, 19), petitioners ignore the distinc-

tion of that case stated in *Larson* (337 U. S. at 702, fn. 26), and applied here by the court of appeals (Pet. A32). In the *Ickes* case former Secretaries of the Interior had settled and determined that respondents there had acquired vested property rights under Congressional acts, state laws, and government contracts, and the holding was that the incumbent Secretary had no authority to overrule such determinations of his predecessors. As the court of appeals pointed out (Pet. A32), this case presents a converse situation; whatever rights petitioners may have can go back no further than 1924 when the Warren Act agreement was first made, and it is plain that the reclamation officials in both the 1924 and the 1951 contracts treated their rights as secondary and inferior to those of the landowners of the Rio Grande Project.

3. There is also no basis for petitioners' claim (Pet. 8, 18) that the decision of the court below is in conflict with *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80 (C. A. 8), and *Nebraska* v. *Wyoming,* 325 U. S. 589. No question of whether those were suits against the United States could have been present in those cases because the United States was a party to both—by intervention in *Nebraska* v. *Wyoming,* and as plaintiff in the *Ramshorn* case. It would appear (Pet. 18) that petitioners' assertion of conflict is based on the incorrect premise that the court of appeals passed upon the merits of petitioners' claims under their Warren Act contracts. But the court of appeals decided

only that jurisdiction to pass upon the merits was lacking, and so reversed the summary judgment on the merits for the respondents.

Since the judgment is that this case be dismissed for want of jurisdiction, it is clear that the decision has not determined the main contractual and statutory issues upon the merits which petitioners assert (pp. 8-9) are of great importance. In this connection, the court of appeals emphasized (Pet. A33) that this is not a suit for damages but one for specific relief seeking to interfere with the management of the project by the United States.

CONCLUSION

The decision of the court of appeals is correct and does not call for review by this Court. There is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1954.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO ADDITIONAL BRIEF FOR THE GOVERNMENT RESPONDENTS HOWARD E. ROBBINS, A. N. THOMPSON, L. R. FIOCK, AND W. F. RESCH IN OPPOSITION

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We think that the importance of the question presented by our Petition is emphasized rather than diminished by the position which the Solicitor General takes in his brief in opposition.

The Solicitor General rests his opposition to certiorari solely upon the four-judge opinion in *Larson* v. *Domestic &*

Foreign Commerce Corporation, 337 U. S. 682. In doing so he first ignores the fact that in order to treat this opinion as the majority decision it must be limited as Justice Douglas limits it to "the selling of Government property". We urge the importance of a judicial resolution of the disputed question whether the opinion of four judges in the *Larson* case should be considered that of the majority of this Court in a case where the sale of Government property is not involved.

The importance of an immediate judicial resolution of the scope of the four-judge *Larson* opinion is further emphasized by the Solicitor General's second point. He would extend the *Larson* case so far as to permit the executive effectively to confiscate an individual's private property under the cloak of sovereign immunity.

In attempting to distinguish *Ickes* v. *Fox,* 300 U. S. 82, the Solicitor General asserts that a Reclamation official may limit or destroy the water rights, even of Project farmers, so long as he does not overrule an adjudication of such rights by his predecessor.

Certainly *Ickes* v. *Fox* is squarely to the contrary. What Ickes' predecessors had "settled and determined" was that Fox beneficially could use more water than authorized by the express terms of the contract which he signed before he received any water whatever; this "determination" was effected by actual delivery to Fox of the larger quantity of water. This Court held that Fox's right was measured by the extent of such beneficial use, regardless of the earlier contract, and that such right could be protected from seizure by injunction.

In the identical situation presented in the case at bar, the court below held that, regardless of the water rights of the Hudspeth farmers, such rights could not by injunction be protected from seizure. That the Solicitor General of the United States should adopt such an extreme position (save only in those cases wherein the citizen's property rights have been administratively adjudicated) underscores

the importance of the third question presented in our petition:

> "Does the *Larson* case go so far as to hold that Government officials with general statutory authority to operate Government property can claim sovereign immunity for acts of operation which deprive individual citizens of their vested property rights?"

CONCLUSION

WHEREFORE, these petitioners submit that a writ of certiorari should issue.

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